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single case of successful mandamus litigation against Veterans Administration officials, neither has it disclosed a single case seeking this type of relief; apparently, the instant case is the first ever attempted and only successful one to date. Is it not wiser ploy to allow compulsory performance of ministerial duties by mandate under 28 U. S. C., §1361 than to protect negligent omissions, commissions and unauthorized acts of federal Veterans Administration employees with the cloak of immunity and unleash a miriad of disgruntled and antagonistic young men on society?

Apparently, Chief Justice Taft thought so when he announced in Work v. United States ex rel Rives, 267 U. S. 175, at 177, 178, 45 S. Ct. 252, (1925) that:

"Mandamus issues to compel an officer to perform a purely

> ministerial duty. It cannot be used to compel or control a duty in the discharge of which, by law, he is given discretion. The duty may be discretionary within limits. He cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has... The extent of the officer's discretion and the scope of judicial action depend upon a proper interpretation of the particular statute and the congressional purpose."

Consequently, when a draft registrant claimed and proved that the application

of the Universal Military Training and Service Act §1 et seq. as amended, 50 U. S. C. A. §451 et seq. to his status as a second year law student would require his classification as 1-S, a writ of mandate issued to compel the officers of the local draft board to classify him in that manner, Carey v. Local Board No. 2, 297 F. Supp. 252, 412 F. 2d. 71, (1969). Moreover, where, as here, the army failed to follow its own regulations in considering an enlisted man's application for hardship discharge, the Court Of Appeals issued mandamus to require the army to reconsider the application properly, Feliciano v. Laird, 426 F. 2d. 424, (1970). See also, Cortright v. Resor, 325 F. Supp. 297, (1971).

Where a discharged federal employee sought reinstatement on the grounds that his removal was without charges and

without opportunity to answer in violation of the Civil Service Act, the court also acted in mandamus to preserve his procedural safeguards, McEachen v. U. S., 212 F. Supp. 206, (1963). See also, Philadelphia v. S. E. C., 175 F. 2d. 808, reversed on other grounds, 337 U. S. 901, 69 S. Ct. 1047, (1949).

Finally, when plaintiff's military record is corrected, based solely upon plaintiff's true Naval Reserve record, momentarily to reflect three years of honorable service as a Naval Officer, these Veterans Administration officials will become guilty of criminal conduct for intent to defraud and failure to comply with the provisions of 38 U. S. C., §354 as will commanding officer, Jerry J. Holst of N. R. S. D. 12-26 for thefting plaintiff's Naval Commission and Dr. Carden for falsifying an official government

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record, for Harmon v. Brucker, Secretary of the Army, 355 U. S. 570, 78 S. Ct. 433, (1958) propogated the mandate that,

> "38 U. S. C., §639h (now 8 U. S. C., §1553) which requires that the findings of the Army Review Board 'shall be based upon all available records relating to the person requesting such review;' the word 'records' means records of military service."

CONCLUSION

For the aforestated reasons the plaintiff respectfully requests that the provisions of 38 U. S. C., §211 precluding mandamus actions to enforce the performance of non-discretionary ministerial duties by Veterans Administration personnel be declared unconstitutional and that the decision in plaintiff's case be vacated

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and replaced by a determination made upon according plaintiff all the normal procedural safeguards.

CERTIFICATE OF GOOD FAITH

I, Michael S. Ross, certify that the foregoing petition for rehearing is made in good faith, in conformance with the provisions of Rule 58 (2) Of the Supreme Court Rules and not for delay or obstruction, except for the long-awaited interjection of plaintiff's corrected military record.

Respectfully submitted,

Michael S. Ross

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